A

Melinda Stevenson v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL K-05(M)-168–03 OF 2018
ABDUL RAHMAN SEBLI, ZABARIAH YUSOF AND HASNAH HASHIM JJCA
12 MARCH 2020

C

Criminal Procedure — Exhibits — Break in chain of evidence — Exhibits in drug trafficking trial not identified in open court before judge, accused and defence counsel — Exhibits purportedly identified by Customs officer during break in trial on special request by prosecuting officer for purpose of carrying out the identification D *— Whether notes of proceedings of trial did not explain what transpired during the break in proceedings — Whether trial judge's judgment and prosecuting officer's written submissions also never explained what had happened — Whether it was pure supposition to conclude exhibits were actually identified during break in proceedings — Whether there was nothing to indicate if identification (if it happened) was done in presence of trial judge and accused and his counsel* E *— Whether break in chain of evidence relating to exhibits fatal — Whether accused's conviction unsafe*

The appellant ('Melinda'), a South African national, was found guilty and F sentenced to death by the High Court for trafficking in 2,241.6g of methamphetamine, an offence under s 39(B)(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The drugs were found inside two gift-wrapped parcels that were concealed within a compartment at the bottom of a trolley luggage bag that Melinda had retrieved from the baggage carousel shortly after she arrived G at the Langkawi International Airport on a flight from South Africa. The drugs were found by Customs officers when they searched the bag after a scan of it raised suspicions about its contents. In her defence to the trafficking charge, Melinda denied knowledge about the drugs saying that the bag was checked in at the airport by her boyfriend who was scheduled to arrive in Langkawi after H her. The trial judge disbelieved her defence, which he found to be a bare denial, and convicted and sentenced her after finding that the prosecution had proven its case beyond reasonable doubt and that Melinda had failed to rebut the statutory presumption of trafficking under the DDA. In her instant appeal against the conviction and sentence, Melinda's main ground was that there was I no positive identification of the drug exhibits ('P16 to P119') at the trial. Melinda's counsel contended that the parcels that supposedly contained the drugs were not produced in court, that none of the prosecution witnesses made any specific reference to them and that there was nothing in the notes of evidence at trial to indicate that the parcels were tendered and marked as

exhibits. Melinda's counsel submitted that the prosecution had failed to establish the chain of evidence in respect of the exhibits. Counsel submitted that P16 to P119 were not identified in open court in the presence of the trial judge and the appellant and her lawyer as was the usual practice in a criminal trial.

Held, unanimously allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) On examining the transcribed notes of evidence taken at the trial, during the prosecution's examination-in-chief of PW5 (the officer who had conducted the 'proses pembongkaran'), the DPP did not refer the witness to any of the exhibits marked as ID16 to ID119. The DPP asked the court for a short adjournment (which was granted) for the purpose of identification of the exhibits. The DPP did not inform the court that the exhibits to be identified were ID16–ID119. When the court resumed 25 minutes later, the exhibits were collectively identified by PW5. As pointed out by the appellant's counsel, the identification of the exhibits was supposedly done when the court adjourned at the request of the DPP. The notes of evidence did not record what had actually transpired during the break in proceedings. One could only assume that during the break PW5 had identified the exhibits. Why wasn't the identification of the exhibits done during the hearing in the presence of the judge? Was the appellant's counsel present when the exhibits were identified? Were any objections made by counsel? None of this was explained either in the grounds of judgment or in the DPP's written submission. In the circumstances, the failure to identify the exhibits before the trial judge had caused a serious break in the chain of evidence (see paras 21–24, 26 & 30).

(2) The identification of the exhibits by PW5 was critical to the prosecution's case. Even though PW5 was asked to identify the exhibits after the court had resumed, it did not validate what had transpired when the case was adjourned and the process of identification as requested by the DPP was conducted in the absence of the trial judge. A scrutiny of the transcribed notes of evidence showed that throughout the examination-in-chief of PW5, ID16–ID119, which were eventually marked as P16–P119, were never referred to him (see para 32).

(3) Section 264 of the Criminal Procedure Code ('the CPC') provided that all evidence shall be taken in the presence of the accused or, when his personal attendance was dispensed with, in the presence of his advocate. Pursuant to s 172B of the CPC, any exhibit to be admitted before the trial must be with the consent of the accused and his advocate and agreed to before the commencement of the trial. The procedures provided under the CPC had to be strictly adhered to in criminal trials. In the instant

A appeal, the trial judge had allowed a procedure not provided for under the CPC upon the request of the DPP which was so severe that it severed the chain of evidence. The conviction of the appellant was unsafe (see paras 33 & 36–37).

B **[Bahasa Malaysia summary**

Perayu ('Melinda'), warganegara Afrika Selatan, didapati bersalah dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar 2,241.6g metamfetamin, suatu kesalahan di bawah s 39(B)(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dadah tersebut dijumpai di dalam dua parsel bungkusan hadiah
C yang disembunyikan di dalam petak di bahagian bawah beg bagasi troli yang diambil oleh Melinda dari karousel bagasi sejurus dia tiba di Lapangan Terbang Antarabangsa Langkawi dalam penerbangan dari Afrika Selatan. Dadah tersebut dijumpai oleh pegawai kastam ketika mereka menggeledah beg itu
D setelah imbasannya menimbulkan kecurigaan berkenaan kandungannya. Berdasarkan pembelaannya terhadap pertuduhan pengedar, Melinda menolak pengetahuan mengenai dadah tersebut dengan mengatakan bahawa beg tersebut didaftarkan di lapangan terbang oleh teman lelakinya yang dijadualkan tiba di Langkawi selepas beliau tiba. Hakim perbicaraan tidak
E mempercayai pembelaannya, yang dianggapnya sebagai penafian kosong, dan menghukum dan menjatuhkan hukuman setelah mendapati bahawa pihak pendakwaan telah membuktikan kesnya tanpa keraguan yang munasabah dan bahawa Melinda gagal menyangkal anggapan undang-undang pengedaran di bawah ADB. Dalam rayuan semasa terhadap sabitan dan hukuman tersebut,
F alasan utama Melinda adalah bahawa tidak ada pengenalpastian positif mengenai ekshibit dadah ('P16 hingga P119') semasa perbicaraan. Peguam Melinda berpendapat bahawa parsel yang kononnya berisi dadah tersebut tidak dikemukakan di mahkamah, bahawa tidak ada saksi pendakwaan yang membuat rujukan khusus terhadapnya dan bahawa tidak ada apa-apa dalam
G nota keterangan semasa perbicaraan yang menunjukkan bahawa parsel tersebut telah dikemukakan dan ditandakan sebagai ekshibit. Peguam Melinda menghujahkan bahawa pihak pendakwaan gagal mebuktikan rangkaian bukti berkaitan dengan ekshibit. Peguam menyatakan bahawa P16 hingga P119 tidak dikenal pasti di mahkamah terbuka di hadapan hakim perbicaraan dan
H perayu dan peguamnya seperti kebiasaan dalam perbicaraan jenayah.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan sabitan dan hukuman serta membebaskan dan melepaskan perayu:

I (1) Setelah memeriksa catatan nota keterangan yang ditranskrip yang diambil semasa perbicaraan, semasa pemeriksaan utama oleh pendakwaan terhadap PW5 (petugas yang telah melakukan 'proses pembongkaran'), DPP tidak merujuk saksi ke setiap satu ekshibit ditandakan sebagai ID16 hingga ID119. DPP memohon mahkamah untuk penangguhan singkat (yang mana dibenarkan) untuk tujuan

pengecaman ekshibit. DPP tidak memaklumkan kepada mahkamah bahawa ekshibit yang akan dikenal pasti adalah ID16–ID119. Ketika mahkamah disambung semula 25 minit kemudian, ekshibit tersebut secara kolektif dicamkan oleh PW5. Seperti yang dinyatakan oleh peguam perayu, pengecaman ekshibit seharusnya dilakukan ketika mahkamah ditangguhkan atas permintaan DPP. Nota keterangan tidak mencatat apa yang sebenarnya berlaku semasa rehat ketika perbicaraan. Ianya hanya boleh dianggap bahawa semasa rehat PW5 telah mengecam ekshibit. Kenapa pengecaman ekshibit tidak dilakukan semasa perbicaraan di hadapan hakim? Adakah peguam perayu hadir ketika ekshibit tersebut dicamkan? Adakah bantahan dibuat oleh peguam? Semua ini tidak dijelaskan sama ada dalam alasan penghakiman mahupun dalam hujahan bertulis DPP. Dalam keadaan ini, kegagalan untuk mengecamkan ekshibit di hadapan hakim perbicaraan telah menyebabkan putusnya rantaian bukti yang serius (lihat perenggan 21–24, 26 & 30).

(2) Pengecaman ekshibit oleh PW5 sangat penting bagi kes pendakwaan. Walaupun PW5 diminta untuk mengecamkan ekshibit setelah mahkamah disambung semula, ia tidak mengesahkan apa yang telah terjadi ketika kes tersebut ditangguhkan dan proses pengecaman seperti yang dimohon oleh DPP dijalankan tanpa kehadiran hakim perbicaraan. Pemeriksaan terhadap nota keterangan yang ditranskrip menunjukkan bahawa sepanjang pemeriksaan utama PW5, ID16–ID119, yang akhirnya ditanda sebagai P16-P119, tidak pernah dirujuk kepada beliau (lihat perenggan 32).

(3) Seksyen 264 Kanun Tatacara Jenayah ('KTJ') memperuntukkan bahawa semua bukti harus dikemukakan di hadapan tertuduh atau, tanpa kehadirannya secara peribadi, di hadapan peguambelanya. Berdasarkan s 172B KTJ, setiap ekshibit yang akan dikemukakan sebelum perbicaraan mestilah dengan kebenaran tertuduh dan peguambela dan dipersetujui sebelum perbicaraan bermula. Prosedur yang disediakan di bawah KTJ harus dipatuhi dengan ketat dalam perbicaraan jenayah. Dalam rayuan segera, hakim perbicaraan telah membenarkan prosedur yang tidak diperuntukkan di bawah KTJ atas permintaan DPP yang sangat mustahak sehingga memutuskan rangkaian bukti. Sabitan perayu tidak dibenarkan (lihat perenggan 33 & 36–37).]

Cases referred to

Abdullah bin Yaacob v PP [1991] 2 MLJ 237; [1991] 1 LNS 68, SC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)
Ogbodo Sunday Tochukwau v PP and other appeals [2016] MLJU 1759; [2016] 9 CLJ 686, CA (refd)

A *Sia Pang Liong v PP* [2013] 2 MLJ 490; [2012] 9 CLJ 848, FC (refd)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)
Teoh Hoe Chye v PP; Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)

Legislation referred to

B Criminal Procedure Code ss 172A, 172B, 264
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), 39B(2), First Schedule

C **Appeal from:** Criminal Case No 45A-06–03 of 2015 (High Court, Alor Setar)

Simon Murali (Kok Yuen Lin with him) (Simon Murali & Co) for the appellant.
Wong Poi Yoke (Public Prosecutor, Attorney General's Chambers) for the respondent.

D **Hasnah Hashim JCA:**

[1] This is the appellant's appeal against the decision of the High Court which convicted the appellant of the charge against her under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for the offence of trafficking in 2,241.6g of methamphetamine punishable under s 39B(2) of the DDA. The charge reads as follows:

E

> Bahawa kamu pada 12 Oktober 2014 lebih kurang 9.15 malam di Balai Ketibaan Lapangan Terbang Antarabangsa Langkawi (LTAL), di dalam daerah Langkawi, dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 2,241.6 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

F

G **[2]** At the High Court after a full trial the learned judicial commissioner on 13 March 2018 found the appellant guilty as charged under s 39B(1)(a) of the DDA. The appellant was convicted by the learned JC and sentenced to death.

[3] Before us the appellant appealed against conviction and sentence. We heard the appeal on 5 August 2019 and after perusing the records of appeal and considering both the written and oral submissions of the learned deputy public prosecutor ('DPP') and learned appellant's counsel we allowed the appeal and set aside the conviction and sentence. We now give our reasons.

H

I THE CASE FOR THE PROSECUTION

[4] The facts as narrated by the High Court are as follows. On 12 October 2014 at 8.20pm, Melinda Stevenson ('the appellant'), a South African national arrived at the Langkawi International Airport ('LIA') via flight SILKAIR

(MI0368) from Singapore, in transit from Johannesburg. After the appellant passed through immigration control, she proceeded to claim her trolley luggage bag ('P54') at the baggage carousel at the airport. PW3, Muhd Ridzuan Abdul Ghani a customs officer who was in charge of inspecting incoming passengers' baggage at the airport was stationed at a scanner machine at the material time. He noticed a female passenger, the appellant behaving suspiciously holding P54 wrapped with a blue luggage-wrapper plastic. PW3 requested the appellant to place P54 into the scanner machine for scanning purposes. She placed P54 into the scanner machine. Zaidi Abdul Razak ('Zaidi'), the officer manning the scanner scanned the appellant's luggage. When P54 passed through the scanner machine, Zaidi saw through the screen monitor suspicious images and asked PW3 to conduct further investigation of P54. PW3 in the meantime asked the appellant for her passport for purposes of verification of identification and confirmation that P54 belong to her. The particulars in the passport matched the information from the baggage tag which was tied around the handle of P54. After the verification, PW3 was satisfied that the appellant was the holder of the passport and the owner of P54.

[5] The appellant was then asked to open P54 which was fully wrapped with a blue plastic wrapper. The appellant was given a pair of scissors and asked to cut the blue plastic wrapper covering P54 which was not locked. PW3 asked the appellant to open P54 and in it were clothes, toiletries and a book. The image on the scanning machine had shown images of suspicious looking items packed in P54. PW3 searched for the items in P54 but could not find anything. He then discovered a zipped compartment at the base of P54. He unzipped the compartment and discovered two concealed gift wrapped parcels, one with butterflies print and the other one with flower print.

[6] When questioned by PW3 what was in the two parcels, the appellant told him that the parcels contained souvenirs that she plans to give to her friends in Langkawi. PW3 then placed the package wrapped with butterflies print on the scanning machine and the screen monitor showed two more packages in the gift wrapped parcel. He then asked the appellant what was inside the two parcels and she replied that the parcel contained chocolates. SP3 then proceeded to open the parcel wrapped with the butterflies print and discovered further two more packages wrapped in aluminum foil. He tore a bit of the aluminum foil and found a transparent plastic containing clear crystalline substance. PW3 apprehended the appellant and instructed her to remain seated whilst he called his superior, Suntherason a/l Rajagopal ('PW5').

[7] PW5 examined P54 and found the two parcels tucked away in the concealed compartment at the base of P54. When he opened the parcels he found four packages wrapped with aluminum foil containing crystalline granular substances. The two parcels together with its content were then

handed to Sahirman Mohd ('PW7'), the investigating officer attached to the Cawangan Penguatkuasaan Kastam Langkawi. PW7 sent the drug exhibits to the Chemistry Department for analysis by the chemist, Haslinda Ismail ('PW4'). PW4 after conducting the necessary test confirmed that the substance found in the four packages is methamphetamine weighing 2,241.6g which is listed as dangerous drugs under the First Schedule of the DDA.

Findings of the judicial commissioner ('JC')

[8] At the end of prosecution case, the learned JC found that the prosecution had made out a prima facie case against the appellant and proven the following elements:

(a) the subject matter concerned is 2,241.6g of methamphetamine;

(b) the appellant had possession and knowledge of the subject matter; and

(c) the appellant at the place, time and date stated in the charge against her did traffic the subject matter.

[9] The learned JC found that the prosecution had proven that the drug seized was the type, nature and weight as testified by the prosecution witnesses. The evidence revealed the quantity of drugs was in excess of the statutory minimum prescribed under s 37(da) of the DDA and militates against any argument that the drugs were for personal use.

[10] The learned JC found that the prosecution had proven direct trafficking as defined under s 2 of the DDA. The manner in which the drugs were packed was deliberate to avoid detection as well as the fact that the appellant arrived in LIA showed that appellant was carrying the said drugs for the purpose of trafficking. The learned JC found that the appellant had both custody and control of P54 and knew the contents of the two parcels concealed in P54.

[11] The learned JC found that the prosecution had proven a prima facie case against the appellant as per the charge preferred against her. The appellant was called to enter her defence on trafficking.

The defence

[12] The accused elected to give an unsworn statement from the dock. In her prepared written statement, the appellant told the court that she and her boyfriend, Francois had planned a vacation in Langkawi, Malaysia. They were scheduled to fly from Johannesburg, South Africa and arrived at Langkawi transit from Singapore. However, the appellant flew to Langkawi alone. Francois, her boyfriend, purportedly took another flight to Langkawi from

Singapore. However, he accompanied the appellant to the airport and was the one according to the appellant checked-in P54. She alleged that he was the one who had custody and control of P54 before it was checked-in. The appellant claimed that she was unaware of the parcels and told PW7 that someone most probably her boyfriend could have placed the two parcels in P54:

> Q46 A: MR SUNTHERESAN TOOK STATEMENT FROM ME ABOUT 1 HOURS (sic) AND DURING THE STATEMENT TAKING EVENT, I HAD MENTIONED AND NARRATED TO HIM IN DETAILS (sic),WITH ALL PARTICULARS, SUCH AS WHERE I CAME FROM, FROM WHICH AIRPORT I CHECK IN, AND THE FACT THAT THE BAG, WHERE THEY SAID THEY FOUND DRUGS WERE ACTUALLY WAS BROUGHT IN, TO THE AIRPORT BY MY BOYFRIEND AND WAS CHECKED IN BY HIM TOO AND THAT I SUSPECTED HE MIGHT HAVE PUT OR PLACED THOSE 2 BOXES INTO THE BAG, AND I ALSO TOLD MR. SUNTHERESAN THAT MY BOYFRIEND SHOULD COME TOMORROW AND THAT I SUSPECTED MY BOYFRIEND COULD PUT THE BOXES IN MY BAG WHEN I WAS SMOKING BEFORE CHECKING IN ...

Findings at the conclusion of the trial

[13] At the end of the prosecution's case having regard to the totality of the evidence adduced, the circumstances and the probabilities of the case, the learned JC found that the charge had been proven beyond reasonable doubt against the appellant. After considering the appellant's version of her defence, the learned trial judge found that the appellant had failed to raise any reasonable doubt in the prosecution's case. The learned JC found the appellant's defence that she had no knowledge of the impugned drugs to be a bare denial and an afterthought and rejected the appellant's defence of no knowledge.

[14] The learned trial judge also found that the appellant had failed to rebut both the statutory presumptions under s 37(d) and (da) of the DDA on the balance of probabilities. The appellant was convicted and sentenced to suffer the mandatory death penalty as mandated under s 39B(2) of the DDA.

OUR DELIBERATION AND DECISION

[15] Before us, the learned counsel for the appellant canvassed mainly three points in his submissions, namely:

(a) no positive identification of the alleged drug exhibits at the trial;

(b) the evaluation of the defence case was flawed as the court had erroneously drawn inference against the appellant; and

(c) the grounds of judgment alluded to a different charge.

A **[16]** The crux of the appellant's defence was that she had no knowledge of the drugs and that the drugs did not belong to her. Learned counsel for the appellant submitted that there was no positive identification before the court in respect of the two gift wrapped parcels and the four packages wrapped with aluminum foil inside the parcels. The two parcels were not even produced in
B court. None of the prosecution witnesses made specific reference to any parcel. According to learned counsel in his submission there is nothing in the record indicating that the two parcels were specifically identified and tendered by the relevant witnesses. The two parcels constitute an important evidential component as the drugs that were packed and wrapped in aluminum foil were
C found in the two parcels which were concealed in compartment in P54. It was argued that the prosecution failed to establish the chain of evidence in respect of the exhibits since there was no mention of the parcels that purportedly contained the drugs (P128A–D).

D

[17] It was the submission of the learned counsel for the appellant that according to PW3 and PW5 one parcel was wrapped in a gift wrapping paper with butterflies print and the other, wrapped in a wrapping paper with flower print. According to the prosecution witnesses in each of the parcels there were
E four packages wrapped in aluminium foil found. However, none of the witnesses made any specific reference to any of the parcels and there is nothing in the transcribed notes of evidence indicating that the parcels were tendered and marked as exhibit.

F **[18]** Learned counsel highlighted that at the trial the exhibits ie P16–P119 were not identified in open court which is the usual and accepted practice in a trial. What had happened in this case was that the learned deputy public prosecutor (DPP) in the midst of the examination-in-chief of PW5 had requested the court to stand down the hearing for purposes of identification of
G the exhibits. This request was granted by the learned JC. When the trial resumed after a 25 minutes' break, the DPP continued with the examination-in-chief of SP5 and asked him whether he managed to identify all the exhibits to which he answered in the affirmative. PW5 did not identify the exhibits in open court in the presence of the JC as well as the appellant's counsel
H and the appellant. In the absence of positive identification of the exhibits, the prosecution failed to establish the chain of evidence. Relying on *Sia Pang Liong v Public Prosecutor* [2013] 2 MLJ 490; [2012] 9 CLJ 848, learned counsel urged this court to allow the appellant's appeal and that the appellant be discharged and acquitted of the offence charged.

I

[19] In response, learned DPP argued that there was no break in the change of evidence as the prosecution witnesses had positively identified the exhibits which were all duly tendered and marked. There was no break in the chain of evidence as all exhibits, in particular P128A–D were all identified and marked

through the respective officers handling the exhibits ie the store keeper (PW1), the enforcement officer (PW5), the chemist (PW4) and the investigating officer (PW7). The movement of the exhibits were all explained by the prosecution witnesses.

[20] The learned JC found that there was no break in the chain of evidence as explained in his grounds of judgment:

> [36] Saya berpendapat tidak ada keraguan mengenai identiti dadah-dadah tersebut. Pihak pendakwaan telah berjaya membuktikan tidak ada kelompangan di dalam rantaian keterangan barang kes daripada mula ianya dirampas oleh SP5 sehinggalah diserahkan kepada Pegawai Penyiasat ('SP7'). Selanjutnya SP7 menyerahkan barang kes dadah kepada Ahli Kimia ('SP4') untuk dianalisa. Kesemua barang kes yang dirampas telah ditandakan dengan sempurna oleh SP7 dengan menurunkan tanda tangan dan tarikh. SP7 juga mengecam semua penandaan yang dibuat olehnya di Mahkamah. SP7 juga mengecam barang-barang kes berdasarkan kepada gambar-gambar barang kes yang diambil selepas tangkapan.

[21] To determine what transpired during the trial we need to examine the notes of evidence. During the examination-in-chief of PW5 he narrated what he did when he conducted the 'proses pembongkaran':

> TPR: Boleh kamu ceritakan proses pembongkaran yang kamu laksanakan?
>
> SP5: ... Seterusnya, saya menandakan bag bagasi yang besar berwarna coklat sebagai 'C.' Hasil dari pemeriksaan di luar, saya hanya menemui wrapping plastic zip kedua dimana saya turunkan tandatangan pada plastic tersebut. Di bahagian zip, tidak ada apa-apa barang selain barang itu. Selepas itu, saya membuka bagasi tersebut dan saya mendapati bagasi itu diisi pakaian. Saya menyenaraikan pakaian- pakaian mengikut turutan, C1 dan saya juga tidak menjumpai apa-apa di bahagian tersebut. Selepas itu, saya mendapati ada satu lagi bahagian bezip dibawah bahagian bagasi tersebut. Selepas itu, saya membuka zip tersebut dan saya dapati ada dua bungkusan di bahagian tersebut. Saya tandakan bahagian tersebut sebagai 'C2'. Hasil daripada pemeriksaan saya ke atas bungkusan tersebut, bungkusan 1 sebagai C 2 1. Selepas saya membuka bungkusan tersebut dengan pisau, saya dapati ada aluminium foil di dalamnya. Selepas pemeriksaan rapi, saya dapati ada dua bungkusan aluminium foil. Selepas itu, saya mengunakan pisau memotong plastik di bahagian hadapan bungkusan 1 iaitu C-2-1-1 dengan pisau.

(See: record of appeal Vol 2; p 79.)

[22] It is observed that at this stage of examination-in-chief of PW5 the DPP did not refer the witness to any of the exhibits which were marked as ID16–ID119. The learned DPP conducting the trial had then asked the court for a short adjournment for the purposes of identification of exhibits. However, he did not inform the court that the exhibits to be identified were ID16–ID119:

TPR: Kamu boleh cam ke semua ekshibit yang telah kamu bongkar?

SP 5: Boleh

TPR: *Saya pohon kes ini ditangguhkan sebentar untuk tujuan pengecaman.*

Mahkamah: Tangguh sebentar @ 3.45petang (See: Record of Appeal Vol 2; page 85)

(Emphasis added.)

[23] At 4.10pm according to the transcribed notes of evidence, the court resumed and it was only at this stage that the learned DPP referred PW5 to exhs ID16–ID119:

TPR: Dengan izin Yang Arif untuk teruskan pemeriksaan ini. *Sewaktu penangguhan awak dirujuk dengan kesemua ekshibit yang kamu bongkarkan.* Boleh kamu sahkan dan camkan?

SP5: Ya. *Saya dapat camkan kesemua barang yang ditandakan saperti di dalam borang bongkar*

TPR: Ekshibit-ekshibit yang dimaksudkan ialah *ID16-ID119* dan P128A hingga D. Saya pohon agar ekshibit-ekshibit (sic) ID16-ID119 di tanda semula sebagai P.

Mahkamah: *P16-P119*. (Emphasis added.)

(See: record of appeal Vol 2; p 86.)

[24] As pointed out by learned counsel for the appellant the identification of the exhibits was done when the court adjourned at the request of the DPP. The notes of evidence did not record what had actually transpired during the break purportedly for the identification of exhibits. One can only assume or make conjecture that during the break PW5 identified the exhibits. References were made to exh P130 when the DPP was examining PW5 but the witness was not referred to exhs ID16–ID119. Why wasn't the identification of the exhibits done during the hearing in the presence of the judge? This was not explained by the learned JC in his grounds of judgment nor the learned DPP in her written submission. Identification of exhibits were done in open court during the examination-in-chief of Sahirman Mohd, Penolong Pengarah Kastam (PW7):

TPR: Dengan izin. Untuk menjimatkan masa saya pohon untuk SP7 mengecam secara kolektif ekshibit (sic) *P16 sehingga P119*, ekshibit (sic) *P128 A hingga B.* Pohon kebenaran untuk saksi mendekati barang kes.

(SP7 mendekati barang kes untuk membuat pengecaman)

TPR: Encik Sahirman, kamu telah melihat kesemua barang kes sebentar tadi adakah kamu camkan kesemua barang kes?

(SP7 telah menyemak dan membuat pengecaman barang kes)

(See: record of appeal, Vol 2; p 118.)

[25] Abdul Hamid CJ (later LP) in the Supreme Court case of *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220, observed:

> Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi*'s case).
>
> We would observe at this point that the law is clear in that 'it is unnecessary to call evidence to ensure there is no break in the chain of evidence (*Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75. But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.

[26] We had considered the evidence and the criminal procedure on this aspect of the defence case very carefully. In our view, in the circumstances of the case the failure to identify the exhibits before the learned JC had caused a serious break in the chain of evidence. In *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551, the Court of Appeal held atp 508 (MLJ); pp 568–569 (CLJ):

> First, by way of a general observation, I am of the view that, in a drug trafficking case *what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc. and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls*. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.
>
> The proof of the chain of evidence is only a method of proving that fact. *The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact*. (Emphasis added.)

[27] In *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75, the appellant had been convicted of possession of four pistols and 175 rounds of ammunition and sentenced to death. In the course of his interrogation by the police, the appellant had led the police to the place where he hid the pistols and ammunition and the exhibits were found. The exhibits were handed over by Insp Takbir to another police officer. At the trial, Insp Takbir produced the exhibits and identified them. No other police officers who had handled the exhibits were called to testify. No objection was raised by the defence. At the appeal it was argued that there was a break in the chain of evidence. It was held by the Supreme Court that it is unnecessary to call evidence to ensure that there is no break in the chain of evidence. If the officer who picked up the object at the scene produced it and identified it as that very object that is enough and there is no need to call every other officer who handled it, unless there is doubt as to the identity.

[28] On the issue of proof of exhibits and the necessity of calling the witnesses, Tun Suffian LP said:

> The complaint before us was not that there had been no proof that the exhibits were serviceable, but simply that there was a 'break in the chain of evidence', and the prosecution should have called as witnesses all the officers through whose hands the exhibits passed from Insp Takbir to the armourer and back to the inspector. We do not think there is merit in this point. The question was whether the exhibits the inspector produced were the guns and ammunition he found at the scene, and as when he produced them as those very guns and ammunition there was no objection by the defence, it would have been a waste of judicial time to call all the intervening handlers. In our experience much judicial time is spent unnecessarily, notably in subordinate courts, in ensuring no break in the chain of evidence. In our judgment, if the officer who picked up an object at the scene produced it and identified it as that very object, that is enough, and there is no need to call every other officer who handled it.

[29] Hashim Yeop A Sani CJ (Malaya) delivering the judgment of the Supreme Court in *Abdullah bin Yaacob v Public Prosecutor* [1991] 2 MLJ 237; [1991] 1 LNS 68 emphasised:

> It is certainly true that, as was said in *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75, the Federal Court had held there that it is not required of the prosecution to call all the officers or the persons concerned who had seen or identified an exhibit. This is not the real intention of the law. *Su Ah Ping* [1980] 1 MLJ 75 only decided the general principles. *But the facts of one case differ from those of another and the duty of the prosecution in each case is to prove the case beyond any reasonable doubt to the court. The case must be clearly proved without [reasonable] doubt or question that can be raised about the exhibits.* See also *Teo Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220 at p 229. There should be no break in the chain of evidence giving rise to doubt relating to the exhibits. (Emphasis added.)

[30] In the instant appeal, PW5, the officer who had conducted the 'proses pembongkaran', did not identify the objects in open court but only did so during the short break. When the court resumed the exhibits were again collectively identified by PW5. The DPP did not explain to the court what had actually transpired during the break which he had requested for purposes of identification of the exhibits, that is, the exhibits that were identified during the break; whether the appellant's defence counsel at that time was present during the identification of the exhibits; whether there was any objection made by the assigned defence counsel.

[31] The Federal Court in *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649 held:

> [26] In other words, an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. *Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. In short it is a fact sensitive exercise.* (Emphasis added.)

[32] The identification of the exhibits by PW5 is critical to the prosecution's case. Even though PW5 was asked again in open court to identify the exhibits it does not validate what had transpired when the case was adjourned and the process of identification as requested by learned DPP, was conducted in the absence of the learned JC. Furthermore, we have scrutinised the transcribed notes of evidence and we noted that throughout the examination-in-chief of PW5 exhs ID16–ID119 which eventually were marked as P16–P119 were never referred to him.

[33] In *Ogbodo Sunday Tochukwau v Public Prosecutor and other appeals* [2016] MLJU 1759; [2016] 9 CLJ 686, this court held:

> The dispensation of justice involved both procedural and substantive law. Justice cannot be dispense when its procedures are ignored.

The Criminal Procedure Code ('the CPC') prescribed procedures in criminal proceedings. Section 264 of the CPC provides that all evidence shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his advocate:

> Except as otherwise expressly provided all evidence taken under Chapters XIX and XX shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his advocate.

[34] Section 172A of the CPC sets out the matters an advocate representing an accused may discuss with the prosecution during the pre-trial conference:

A
(a) identifying the factual and legal issues;

(b) narrowing the issues of contention;

(c) clarifying each party's position;

B
(d) ensuring the compliance with section 51A;

(e) discussing the nature of the case for the prosecution and defence, including any alibi defence that the accused may rely on;

(f) discussing any plea bargaining, and reaching any possible agreement thereto; and

C
(g) any other matters as may be agreed upon by the advocate representing the accused and the prosecution that may lead to the expeditious disposal of the case.

(5) All matters agreed upon in the pre-trial conference by the advocate and the
D prosecution shall be reduced into writing and signed by the accused, the advocate and the prosecution.

[35] Section 172B of the CPC provides that at the case management, the judge shall:

E
(i) take into consideration all matters that have been considered and agreed to by the accused and his advocate and the prosecution during the pre-trial conference; and where a plea bargaining has been agreed between the accused and his advocate and the prosecution during the pre-trial
F conference, the Magistrate or the Sessions Court Judge or the Judge trying the case shall decide on the voluntariness of the accused in the plea bargaining according to the provisions of section 172C;

(ii) where no pre-trial conference has been held on the ground that the accused is unrepresented, discuss with the accused and the prosecution
G any matter which would have been considered under section 172A;

(iii) assist an accused who is unrepresented to appoint an advocate to represent the accused;

(iv) determine the duration of the trial;

H
(v) subject to subsection (3), fix a date for the commencement of the trial;

(vi) *subject to the consent of the accused and his advocate, and the prosecution, admit any exhibits*; and

(vii) give directions on any other matter as will promote a fair and expeditious
I trial. (Emphasis added.)

[36] Any exhibit to be admitted before the trial must be by consent of the accused and his advocate and agreed to before the commencement of the trial. In criminal trial the procedure as provided under the CPC must be strictly

adhered to. In the instant appeal the learned JC allowed a procedure not provided under the CPC upon the request of the learned DPP that is so severe that it severed the chain of evidence.

CONCLUSION

[37] Therefore, we found the appeal had merit and warranted our intervention. On reading the records of appeal before us we found the conviction to be unsafe. We unanimously allowed the appeal. The conviction and sentence passed by the learned JC are set aside. The appellant is acquitted and discharge of the offence.

Appeal allowed unanimously; conviction and sentence set aside; and appellant acquitted and discharged.

Reported by Ashok Kumar